

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 137 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

ILABEN W/O NANABHAI N MEKWAN

Appearance:

MR ND GOHIL, APP, for Petitioner
MR PM THAKKAR for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 22/08/2000

ORAL JUDGEMENT

1. The present appeal arises out of a judgment and order rendered by learned Metropolitan Magistrate, Court No.17, Ahmedabad, in Criminal Case No.2434 of 1986 acquitting present respondent for an offence punishable under Section 379 of the Indian Penal Code.

2. The respondent (hereinafter referred to as "the accused") is a Staff Nurse in the Civil Hospital, at Ahmedabad. On July 8, 1986, she was passing by a lift in the lobby in the Hospital Building when she was accosted by Dharamvirsinh Chiranjivsinh Rathod, a Staff Watchman. According to him, the accused was not in uniform and was carrying a bag. The complainant got suspicious as the bag contained heavy things. He, therefore, asked her to stop and show the bag. He found nine muddamal articles varying from surgical needle packets to medicines and bandages, the total value of which, according to the prosecution, is about Rs.295/-. According to the prosecution case, the Watchman took the accused to the office of the Security Officer. He saw the muddamal and asked the complainant to take the accused to the Police Station and lodge a complaint. The complainant took the accused to the Police Station and lodged the complaint. The police registered the offence and started investigation; called the Panchas; seized the muddamal by drawing a Panchnama; and after investigation, filed the charge sheet. The learned Metropolitan Magistrate framed the charge against the accused for offence punishable under Section 379 of Indian Penal Code, at Ex.2. The evidence was recorded and, after considering the evidence, in light of the contentions raised by the prosecution as well as the defence, the learned Metropolitan Magistrate came to conclusion that the prosecution has failed to establish the guilt of the accused and, therefore, acquitted the accused of the offences with which she was charged. Aggrieved by the said judgment and order, the State of Gujarat has preferred this appeal challenging the same mainly on the grounds that the learned Magistrate erred in discarding the evidence of the complainant Dharamvirsinh; that the learned Magistrate committed an error in not accepting the seizure of the muddamal by the complainant; and that the learned Magistrate committed an error in not considering circumstantial evidence which lends corroboration to the evidence of the complainant.

3. Learned Additional Public Prosecutor, Mr. Gohil, submitted that the accused was found to be in possession of muddamal articles which carried label of Government of Gujarat. The accused is a Staff Nurse in the Civil Hospital. She had an access to these articles and these articles would not be available in open market. These aspects have been overlooked by the learned Trial Magistrate and benefit is given to the accused by discarding the evidence of the complainant. The complainant is a Government employee and his deposition

ought not to have been discarded by the learned Magistrate. Mr. Gohil submitted that simply because Panchas have turned hostile and simply because suggestions are put to the witnesses about enmity, the deposition of the complainant and the prosecution case ought not to have been discarded by the learned Magistrate. Here is a case of theft of government property and ought to have been viewed seriously. He, therefore, urged that the appeal may be entertained, the accused may be convicted for the offence for which she is charged.

4. Mr. H.N. Joshi, learned advocate appearing for M/s Thakkar Associates for the respondent, submitted that this is an acquittal appeal and the Court may not interfere with the verdict of the Trial Court, if the view taken by the Trial Court is not found to be palpably illegal or demonstrably unsustainable. If the view taken by the Trial Court is also a possible view, this Court may not interfere with the order of acquittal. He submitted that the only evidence that may connect the accused with the offence is that of the Watchman, the complainant. Admittedly, when the accused was intercepted by the complainant and her bag was searched, another Watchman was present. Both the Watchmen took the accused together to the office of the Security Officer and, in turn, to the Police Station. The other Watchman-Bhanvarsinh has not been examined. Mr. Joshi submitted that there is no evidence whatsoever to connect the accused with the muddamal as seizure is not proved. The only evidence is that of the complainant, who says that she was in possession of the muddamal articles when he intercepted her. The deposition of the complainant indicates that he has no regard for the truth as he has deposed contrary to what was there on record, namely, his earlier prosecution. He admits that fact only on being cornered during the cross-examination. Coupled with this, there is a defence of the accused that the relations between complainant and the accused are strained and there is previous enmity. Under the circumstances, the conclusion of the learned Magistrate that deposition of the complainant cannot be the basis for conviction is correct. The prosecution cannot be said to have proved the guilt of the accused and this appeal, therefore, may be dismissed.

5. Before dealing with rival side contentions, it may be noted that the law governing acquittal appeals, as settled by various pronouncements of the Apex Court, is that the Court has to be slow in interfering with order of acquittal while deciding the acquittal appeal. If two

views are possible and the view taken by the Trial Court is not an impossible one, the Court may not interfere with the acquittal order. The Court may interfere with an acquittal order if the view taken by the Trial Court is impossible one or the reasoning adopted and conclusion arrived at by the Trial Court are palpably illegal or erroneous or demonstrably unsustainable, resulting into miscarriage of justice.

6. With the above legal proposition, if the contentions raised before this Court are considered, it appears that when the accused was intercepted and muddamal articles were found from the bag in possession of the accused, one Bhanvarsinh, a Staff Watchman, was present besides the complainant himself. This witness-Bhanvarsinh is not examined by the prosecution. The Security Officer-Jayantibhai, who has been examined, has no personal knowledge about the possession of the muddamal because he was not present when the accused was intercepted and the bag was examined. After the complaint was lodged and investigation started, the muddamal was seized by the Investigating Agency. To this seizure also, there is no independent evidence. The Panch witness Ashok Ramdin has not supported the seizure. He has been declared hostile. All that he states that his signature was obtained by the police on the Panchnama at a Pan Stall. He had never gone to the Police Station. Another witness to the Panchnama - Rameshji Ishwarji Thakore has not been examined. Thus, the prosecution cannot be said to have fully established the nexus between the muddamal and the accused except the deposition of the complainant, who claims to have intercepted the accused, examined the bag and have found the muddamal articles in the bag.

6.1 In this regard, it is worthwhile to note that the Security Officer-Jayantibhai (Ex.6) admits that the medicines and injections alleged to have been found in possession of the accused are given to outdoor patients also. Further, the Investigating Officer-Dasharathsinh Jhala (Ex.13) states in his deposition during cross-examination that the muddamal articles are available in open market.

6.2 With the above aspects, it requires to be considered that, according to the Investigating Officer, stock registers are being maintained in the Civil Hospital, but he has not examined them. In fact, the investigation does not seem to have proceeded on that line to ascertain if there is any shortage in the stock in the Civil Hospital. There is no evidence to indicate

that this muddamal was, in fact, from the Civil Hospital or was found to have been stolen or misappropriated. There is absolutely no material to indicate where from the muddamal is stolen.

7. In light of the above discussion, what appears is that the prosecution has not been able to establish the nexus between the accused and the muddamal; the prosecution has not been able to establish where from the muddamal is stolen; and the prosecution has not been able to indicate any shortage of the medicines or the articles of muddamal coupled with the fact that such muddamal is admitted to be available in open market, and the same being not even labeled as Government property, the accused could not have been convicted, as has rightly been done by the learned Trial Magistrate.

7.1 This Court has gone through the evidence and the judgment and does not find any error in the reasoning adopted by the Trial Magistrate and the conclusions arrived at by him. This Court is in full agreement with the reasonings adopted and conclusion arrived at by the learned Trial Magistrate and finds no reason to interfere with the judgment and order of the Trial Magistrate recording acquittal of the accused of the offence punishable under Section 379 of the Indian Penal Code.

8. In the result, the appeal must fail and is, therefore, dismissed.

[A.L. DAVE, J.]

gt